

BRB No. 90-2030

ALFRED L. HUDSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille, Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before:

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (88-LHC-2401) of Administrative Law Judge A. A. Simpson, Jr., on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Since 1985, claimant has worked as a sheet metal mechanic for employer, where he is exposed to loud noise. On October 23, 1987, an audiometric evaluation performed by Dr. James Wold revealed a binaural impairment of 5.9 percent. Cl. Ex. 2. Claimant gave employer notice of his injury and filed a claim for occupational hearing loss benefits on November 18, 1987. Cl. Ex. 4. Previously, on May 14, 1987, Assistant District Director¹ Robert H. Bergeron advised employer's attorney that due to the unprecedented number of hearing loss claims filed in his office against employer, employer was excused from filing notices, responses, controversions and making payments in regard to these claims as required by Section 14(e) of the Act, 33 U.S.C. §914(e), until 28 days following service of a claim by the district director's office. Emp. Ex. 3. On January 5, 1988, employer filed its notice of controversion. Emp. Ex. 2. A second audiometric examination performed on January 26, 1988, yielded results interpreted by Dr. Philip P. Gilchrist and by Jim D. McDill, Ph.D., as indicative of a 2.2 percent binaural hearing loss due to occupational noise exposure. Emp. Ex. 4.

The administrative law judge awarded claimant compensation for a 4.05 percent binaural hearing loss based on the average of the two audiograms pursuant to Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B). Relying on *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *aff'g in part, part sub nom.*; *Fairley v. Ingalls Shipbuilding*, 22 BRBS 184 (1989)(*en banc*), the administrative law judge also found that the "excuse" granted by the district director was invalid and that since employer did not timely pay benefits or controvert the claim, it was liable for a Section 14(e) assessment.

On appeal, employer contends that the administrative law judge erred in holding it liable for a Section 14(e) penalty. Specifically, employer asserts that the administrative law judge erred in finding invalid the "excuse" granted by the district director. Moreover, employer contends that the

¹Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105 the term "district director" has replaced the term "deputy commissioner" used in the statute.

instant case is distinguishable from *Ingalls Shipbuilding* because the district director's excuse was granted prior to the time that the claim was filed, rather than retroactively. In the alternative, employer contends that even if employer had not been excused, the concept of "replacement income" is not applicable in hearing loss cases; therefore, the Section 14(e) penalty should not apply. Claimant responds, urging affirmance of the administrative law judge's award of a Section 14(e) assessment.

Employer's precise contentions regarding the applicability of Section 14(e) have previously been rejected by the Board and the United States Court of Appeals for the Fifth Circuit. *Ingalls Shipbuilding Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT)(5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991); *see also Ingalls Shipbuilding*, 898 F.2d at 1095, 23 BRBS at 67 (CRT).² The administrative law judge's finding that employer is liable for a Section 14(e) penalty is accordingly affirmed.³

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

Administrative Appeals Judge

²As we affirm the administrative law judge's finding that employer is liable for a Section 14(e) penalty, claimant's motion to strike a portion of employer's brief is moot.

³In his response brief, claimant's counsel requests permission to file a fee petition for work performed before the Board in responding to employer's appeal. Counsel may file a fee petition which complies with the requirements of 20 C.F.R. § 802.203.

Administrative Appeals Judge

Administrative Law Judge